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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1942

WILLIAM L. MURRAY, as Agent for and on Behalf of JAMES REDDICK, and Others Similarly Situated,
Petitioner,

vs.

NOBLESVILLE MILLING COMPANY, a Corporation,
Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Murray v. Noblesville Milling Co., 42 Fed. Supp. 808;
Murray v. Noblesville Milling Co., 131 Fed. (2d) 470.

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THE FACTS

This is a suit by former employees of the Noblesville Milling Company now in liquidation against the Noblesville Milling Company seeking to recover additional wages with liquidated damages and attorneys' fees under the Fair Labor Standards Act. The employees received more than the minimum required by the act and the sole question is whether they can recover something additional on the ground there was not a proper apportionment of the

wages paid as between straight time and overtime. The employer was out of business before suit was brought and no longer in competition with others, so there is nothing involved as to the future or as to competitive conditions or the public in general. The sole question is—Can 22 plaintiffs recover something in addition to the pay which was accepted as satisfactory during a period of about two and a half years during which the services were rendered? The respondent prior to October 18, 1938, had for many years been operating a mill at Noblesville, Indiana, for making flour and handling wheat and other grains. Its employees were paid at a straight hourly rate which was 40 cents an hour or higher and generally worked about 60 hours a week. On October 18, 1938, the employer called a meeting of the employees to consider what should be done to make their system comply with the Fair Labor Standards Act to become effective in a few days. The employer did not wish to reduce wages and was not in a position to grant an increase. (Transcript 32.) The employees were not interested in reducing hours, but were much interested in not having the amount of money in their weekly pay envelope decrease. The amount they were receiving was sufficient to satisfy the law and it was a question of finding a way to calculate the wages and keep the books that would satisfy legal requirements. The employer proposed that the matter be handled by establishing a base rate of pay of 34 cents an hour with overtime starting after 40 hours at 51 cents an hour. In weeks of such length as to make this schedule yield less than the men received under their existing straight-time rates, the employer in order to keep the act from reducing pay, agreed to add a bonus of enough to bring the total amount paid up to what would have been received under the old rate. The maximum bonus would be $2.40 a week

for a 40-hour week, and as the hours increased, the bonus decreased. At 61 hours it was nine cents and in weeks that exceed 61 hours the man received 34 cents for 40 hours and time and a half for overtime at 51 cents an hour with no bonus, which resulted in an increase in pay for such weeks. (Transcript p. 16.) The 40-hour week was adopted at once to make subsequent revision of the plan unnecessary. Employees receiving over 40 cents an hour before October 18, 1938, received a higher schedule under the new rates proportionate to the existing higher rate. The employer had a blackboard and put figures on it giving illustrations of the way the new rates would be applied. Each employee who testified at the trial that he did not know how to figure his pay under the new rates also testified he understood his base rate was 34 cents and overtime rate 51 cents with a bonus where necessary to prevent a wage reduction. (Transcript 18, 21, 22, 23, 24.) This proposition was accepted by the men and wages paid under it and accepted without objection for the period of about two years and a half until operations ceased. (Transcript p. 44.)

The trial court in its findings of fact No. 7 (Transcript p. 50) found that the employer proposed to its employees the pay schedule above outlined and put it into effect and revised its bookkeeping to reflect it. The statement on page 51 in finding 9, that it was not a bona fide contract is a conclusion not supported by anything in the evidence and contrary to finding 4 on page 48, establishing that the men were paid under the new arrangement, and the contract performed in every particular. This was good faith.

The case in the trial court and Circuit Court of Appeals involved some additional questions as to employees Reddick and Passwater not presented in this Court, and they

are therefore not discussed. The Circuit Court of Appeals did not undertake to decide any question as to the construction of the Fair Labor Standards Act, but merely decided that the facts in this case were covered by the decision of this Court in Walling v. Belo Corporation, 316 U. S. 624, and undertook to follow that decision. The wage arrangement was approved and the decision as to this was correct, and not a matter of general interest.

REASONS FOR NOT GRANTING THE WRIT

1. Each week under the case of Overnight Motor Co. v. Missel, 316 U. S. 572, is a separate unit. It, therefore, follows that weeks under 40 hours are not involved because in such weeks there was no overtime. Weeks over 61 hours are not involved because in such weeks the pay was 34 cents base rate and 51 cents overtime rate with no bonus involved. As to weeks between 40 hours and 60 hours the bonus was in effect an additional overtime payment which is legal. In this case there was a definite agreement that the base hourly rate was 34 cents and that agreement was binding. No question is involved here of converting a weekly rate to an hourly rate. The hourly rate was fixed by a binding agreement and the correct wages paid.

Cases cited by petitioner under Proposition One which undertake to convert a weekly rate to an hourly rate are not applicable to this case. The case of Walling v. Belo Corporation, 316 U. S. 624, is controlling in this case and was correctly applied to the facts. Petitioner on page 16 of his brief says no criticism is made of the Belo decision.

2. The second reason of the petitioner is not valid because the case of Carleton Screw Products Co. v. Flem-

ing, 126 Fed. (2d) 537, is not in conflict with this decision because this case only decides that the facts in this case are within the rule laid down in Walling v. Belo Corporation, 316 U. S. 624, and the Carleton Screw Products case decides nothing on that subject. It proceeds on the theory that the Belo case was wrongly decided in the Circuit Court of Appeals and refuses to follow it. When the Belo case was later affirmed by this Court, any conflicting views in the Carleton Screw Products case were in effect disapproved and when the Circuit Court in our case held that the Belo case was controlling, this in no way conflicted with anything decided in the Carleton Screw Products case. The decision in the Carleton Screw Products case is in conflict with the Supreme Court of the United States, but that is not a reason for certiorari in this case.

3. The third reason assigned by the petitioner is invalid because this Court by its rules already announced in the cases decided by it has provided sufficient rules for the administration of the Fair Labor Standards Act so far as questions here involved are concerned. This case is correctly decided under rules declared by this Court and there is no good to be accomplished by reviewing it. There is nothing in the record to show that any other employers or employees are interested in the questions presented.

Summary of Argument.

1. The issues in this case already have been adequately discussed and decided in the case of Walling v. A. H. Belo Corporation, 316 U. S. 624.

2. There is no conflict in the different Circuits.

3. The case has no general interest or importance.

ARGUMENT

The general rule has been many times announced that the jurisdiction to review judgments of the Circuit Court of Appeals by certiorari is to be exercised sparingly and only in cases of gravity and general importance and in order to secure uniformity of decisions.

Fields v. U. S., 205 U. S. 292, 51 L. Ed. 807, 27 S. C. R. 543;

Forsyth v. Hammond, 166 U. S. 506, 41 L. Ed. 1095, 17 S. C. R. 665.

None of these reasons applies to the case presented by this petition. The petition is very vague as to the reason for which certiorari is requested and merely refers to the general statute under which the writ may issue and does not confine itself to any particular reason that might apply to this case. In view of this lack of definiteness, it is not possible to make our response as clear cut and brief as we would like. We think, however, that it is clear that the decision of the Circuit Court of Appeals is correct and that it does not involve a matter of any general interest or importance and that no review is necessary in order to secure uniformity among the Circuit Courts of Appeal.

In the case of Overnight Motor Transportation Co. v. Wm. H. Missel, 316 U. S. 572, 86 L. Ed. 1682, 62 S. C. R. 1216, the principle is established that under the Fair Labor Standards Act the unit is the week. The Court expressed this proposition in the following language on page 579:

> "It is likewise abundantly clear from the words of Section 7 that the unit of time under that section

within which to distinguish regular time from overtime is the week."

Accepting the week as the unit in this case, it is clear that weeks of less than 40 hours are not involved for the reason that in such weeks there was no overtime. It is equally clear that weeks of over 61 hours are not involved for the reason that as to such weeks, there was simply a straight contract to pay 34 cents an hour for a base rate and 51 cents an hour for overtime. The pay was so handled in such weeks and the contract carried out and men working over 61 hours simply received their base rate for 40 hours and time and a half for time over that. As to such weeks, there does not seem to be any room for argument that there was anything wrong with the arrangement. General Mills v. Williams, 132 Fed. (2d) 367.

The weeks remaining for consideration are the weeks between 40 hours and 61 hours. As to these weeks, there was a clear agreement with the men that the base rate should be 34 cents an hour. The men were paid 34 cents an hour for the base hours and in addition were paid more than time and a half for the remaining hours and each week were paid more than the minimum required by the statute.

The situation is entirely covered by the principles which were announced in the case of Walling v. A. H. Belo Corp., 316 U. S. 624, which decision petitioner on page 16 of his brief accepts as correct.

In that case, just as in this, the employer sought to find a way to comply with the law without reducing anybody's pay. The employer wrote the employees a letter (page 628) outlining the new proposition in the following terms:

> "In order to conform our employment arrangements to the scheme of the Act without reducing the amount of money which you receive each week, we advise that from and after October 24, 1938, your basic rate of pay will be 67 cents per hour for the first forty-four hours each week and that for time over forty-four hours each week you will receive for each hour of work not less than one and one half times such basic rate above mentioned, with a guaranty on our part that you shall receive weekly for regular time and for such overtime as the necessities of the business may demand, a sum not less than $40."

It was contended that such an arrangement was improper, but this Court approved it and used the following language on page 630:

> "It is no doubt true, as petitioner contends, that the purpose of respondent's arrangement with its employees was to permit as far as possible the payments of the same total weekly wage after the act as before. But nothing in the act bars an employer from contracting with his employees to pay the same wages that they received previously so long as the new rate equals or exceeds the minimum required by the act."

* * *

Continuing on page 631, the Court said:

> "In its initial stage the question to which this dispute gives rise is a question of law, a question of interpretation of the statutory term, 'regular rate.' But it is agreed that as a matter of law employer and employee may establish the 'regular rate' by contract."

* * *

> "The difficulty arises from the inclusion of the $40 guaranty. The problem is whether the intention of

the parties to set 67c an hour as the regular rate squares with their intention to guarantee a weekly income of $40.

"The administrator's position is that these two objectives are inherently inconsistent and that the intention to fix the regular rate at 67c is overridden by the intention to guarantee the $40 per week.

"We cannot agree.

"In the first place, when an employee works more than fifty-four and one-half hours in a single week he is admittedly entitled to more than $40 guarantee. The record shows that in such a case the employee is paid at the rate of $1 an hour (150 per cent x $.67) for each hour of overtime. In this situation, then, it is clearly guaranty that becomes inoperative and the 67c hourly rate fixed by the contract is controlling.

"In the second place, although it is perfectly true that when the employee works less than fifty-four and one-half hours during the week his pay is determined by the $40 guaranty, it does not dispose of the problem simply to say this.

"The question remains whether the $40 contemplates compensation for overtime as well as basic pay. The contract says that the employee is to receive 67c an hour for the first forty-four hours and 'not less than one and one-half time such basic rate' for each hour over forty-four.

"Consequently, if an employee works fifty hours in a given week it might reasonably be said that his $40 wage consists of $29.48 for the first forty-four hours (44 x $.67) plus $10.52 for the remaining six hours (6 x $1.753). To be sure $1.753 is more than 150 per cent of $.67, but the act does not prohibit paying more; it requires only that the overtime rate be 'not less than' 150 per cent of the basic rate. It is also true that under this formula the overtime rate per

hour may vary from week to week. But nothing in the act forbids such fluctuation."

* * *

Continuing on page 634, the Court said:

"But the guaranty contract in this case carries out the intention of the Congress. It specifies a basic hourly rate of pay and not less than time and a half that rate for every hour of overtime work beyond the maximum hours fixed by the act.

* * *

"The problem presented by this case is difficult—difficult because we are asked to provide a rigid definition of 'regular rate' when Congress has failed to provide one. Presumably Congress refrained from attempting such a definition because the employment rationships to which the act would apply were so various and unpredictable. And that which it was unwise for Congress to do, this court should not do. When employer and employees have agreed upon an arrangement which has proven mutually satisfactory, we should not upset it and approve an inflexible and artificial interpretation of the act which finds no support in its text and which as a practical matter eliminates the possibility of steady income to employees with irregular hours. When the question is as close as this one, it is well to follow the congressional lead and to afford the fullest possible scope to agreements among the individuals who are actually affected. This policy is based upon a common sense recognition of the special problems confronting employer and employee in business where the work hours fluctuate from week to week and from day to day."

The principle that the employers and employees were to be left free to work out the details of their pay arrangement in a way that was appropriate to the business involved is a principle that applies fully to this situa-

tion. The employer and employee did undertake to establish a base rate which was agreed upon, and to provide pay for time after 40 hours that would be at least equal to time and a half for the remaining hours. The employees in fact had their pay figured on this basis and in fact received a base rate of 34 cents for 40 hours and received in addition an amount that was not less than 150% of the base rate for each additional hour worked. Such an arrangement complied with the statute.

The petitioner has made reference to a number of cases in which it was held that something more was due. None of the cases relied upon by the petitioner, however, are cases in which there was a definite agreement as to what the base hourly rate should be. They are all cases in which there was no agreement for an hourly rate but was an agreement for a weekly rate and the Court has undertaken to lay down rules of law for finding the hourly rate where no hourly rate was agreed upon. Such cases have no application to our situation.

The petitioner has endeavored to make some question as to whether there was a new wage schedule worked out as a result of the meeting of October 18, 1938. However, there is nothing of substance to that contention. The employees who testified as to what the new proposition was all agreed that they understood that the base rate was to be 34 cents and the overtime rate 51 cents. The employer's witnesses testified to the same thing, and further testified that the new rate was uniformly applied and the trial court in its finding No. 7 said:

> "Thereafter defendant put the foregoing plan into effect and revised its bookkeeping system to reflect it." (Transcript, page 50.)

Some of the employees testified that after the new arrangement was made they did not know how to figure their pay and never had attempted to figure it. However, they all admitted understanding the essential features of the new schedule, and since they continued to work for over two years thereafter without raising any question, they accepted the new schedule.

In the case of Williams v. Jacksonville Terminal, 315 U. S. 386, a question was raised as to whether red caps had agreed to a new contract with reference to the way their tips were to be handled. The employer had notified them as to what the new arrangement was. On page 398 the Court said:

> "By continuing to work, a new contract was created. This result follows because the employer, after notice, may keep all earnings arising from the business. * * * If the red cap did not accept the terms offered he would be a volunteer and not an employee. As a volunteer he could probably keep his tips, but would not be entitled to a contractual wage."

The same thought was expressed in the 7th Circuit in the case of Shuppan v. Peoria Ry. Terminal, 30 Fed. (2d) 569. In that case the employer had submitted a proposition as to future terms of employment which the employees never formally accepted but they continued to work. The Court said:

> "The Company, having made it clear what wages it would pay to its employees, those who took employment with it thereafter, or those who continued in its employment, though mistaken as to the power of the company to fix wages must be deemed thereby to have accepted the only terms upon which such continued employment was offered."

This principle applies fully to the facts in this case. After October 18, 1938, the employer never offered any terms of employment except those outlined at the meeting on that date, and if the men were employees at all, after that date, they were employees upon the terms offered.

Petitioner has also claimed that this Court should take over this case on account of the decision in the case of Carleton Screw Products Co. v. Fleming, 126 Fed. (2d) 537, which petitioner thinks is in conflict with this decision.

There is no real conflict in these two decisions. The case involved in this petition decides nothing substantial except that the contract of employment which was involved in this case was within the rules laid down in the Belo case. The Circuit Court of Appeals in our case did not in any way undertake to construe the Wage-Hour Law —they merely decided that the construction given to that law by the Supreme Court of the United States covered the facts in the case before them. The Carleton Screw Products case does not in any way touch on that question. The Carleton Screw Products case was decided before the decision of either the Missel case or the Belo case. Any conflict that may exist with the Carleton Screw Products case is a conflict between the Belo case and the Carleton Screw Products case. It is not a disagreement between circuits, but it is a disagreement between the Circuit Court deciding the Carleton Screw Products case and the Supreme Court of the United States, and such conflict is not a reason for granting a certiorari in our case. Our case has merely followed the rules declared by the Supreme Court of the United States.

The Carleton Screw Products case was cited to this

Court as an authority in the Belo case and was not followed. The reasoning upon which that case proceeds was expressly repudiated in the Belo case. The Carleton Screw Products case on page 540 uses the following language:

> "Defendant's contention finds some support in the case of Fleming v. A. H. Belo Corp., 121 Fed. (2d) 207. * * * We are not persuaded that this decision correctly construes the provision of the statute, and we think it not sustained by the weight of authority."

Thereafter the decision in the Belo case was affirmed by this Court. Such action amounted to a disapproval of the Carleton Screw Products case. The effect of the Carleton Screw Products case was that it was not open to the employer and employee to agree upon a base rate coupled with a provision that the employee was to receive compensation beyond what the employer would receive on the basis of the agreed rate plus time and a half for overtime. The Belo case repudiated this idea and points out that additional money paid under the name of a guaranty can be ignored. Nothing should turn on the question of whether the additional money was paid under the name of guaranty or under the name of bonus. In the Belo case, just as in our case, after a certain number of hours had been worked, the guaranty or bonus disappeared and pay was figured on a straight basis of time and a half for overtime with nothing added. If the Carleton Screw Products case, as we think is the fact, is already in effect overruled, there would be no occasion for taking over this case simply for the purpose of overruling it again. An overruled case does not make a conflict such as is contemplated by the rules of this Court in passing on a petition for certiorari. It is further to be noted

that the difference between what would have been paid under the rule announced in the Carleton Screw Products case and what was in fact paid is so trifling that the matter hardly deserves the attention of the Supreme Court of the United States. The rule in the Carleton Screw Products case only requires that the amount of the bonus is to be added to the amount paid for base hours, and thus a new base rate calculated. If this change should be made in our case, it would involve a lot of figuring to find out just how much change it would make, but it is obvious that the change that would be made would be insignificant. For instance, in a week of 41 hours, under the way the pay was actually figured, there would be a payment of $13.60 for 40 hours straight time at 34 cents, plus 51 cents for one hour overtime, plus $2.39 bonus, making the total amount actually paid $16.40. If this were refigured on the Carleton Screw Products case basis, there would be added to the base rate per hour 1/40 of this $2.39 bonus, which would be .06 cents, making the base rate 40 cents instead of 34 cents. This would mean that the man would be paid $16.00 plus 60 cents overtime, making a total payment of $16.60 or for the week 20 cents more than was actually paid. If instead of taking a 41-hour week, we take a 50-hour week, the result is that under the method followed of paying the men he received 40 hours at 34 cents or $13.60, plus 10 hours overtime at 51 cents, making $5.10, plus $1.30 bonus, making the total paid $20.00. If this pay was refigured under the Carleton Screw Products plan, there would be added to the base rate 1/40 of $1.30, increasing the base rate 3 cents to 37 cents and the overtime rate to 56 cents. Under this setup, the man would receive for his base time $14.80, plus $5.60, making a total of $20.40, or only 40 cents more than he was in fact paid. The increases for other weeks would

be for 45 hours $.25; for 48 hours $.24; for 54 hours $.28; for 58 hours $.16; for 60 hours and above, nothing. The average increase would apparently be somewhere under 30 cents a week and less still for the first two years when required overtime began after 44 and 42 hours. In 52 weeks this would amount to under $15.60 as a maximum. It was in fact substantially less than that because none of the men had overtime every week and they had many weeks in which they put in over 61 hours, so that no bonus was involved. If we estimate that there were 20 weeks a year in which there would be a correction, the difference to each man per year would be less than $6.00, and for his 2½ years would be under $15.00. With 22 men involved, the total amount involved in this contention of the petitioner would be under $330.00, which would not pay the expenses of the litigation for either party, and a controversy that involves no more than this can properly be left to be determined by the Circuit Court of Appeals.

As was before pointed out, this company is out of business and the decision can have no effect on future wages paid by this company or on competitive conditions and probably no other company has made precisely the same arrangement with its employees. If this Court should take over the case, we feel the chances are that the Court would continue to repudiate the Carleton Screw Products decision and that no change would be made in the result reached by the Circuit Court of Appeals. If the Carleton Screw Products decision should be adopted and accepted, it might increase the award to the plaintiffs not over $300.00. We would not think such litigation of sufficient importance to take up the time of this Court.

Petitioner's third reason for the writ is that this case presents an opportunity for the Court to announce fur-

ther rules for the application of the Fair Labor Standards Act. The Court in the Belo decision and in the Missel decision and the red cap decision and numerous other decisions has already established the applicable fundamental principles and we feel that this Court can safely leave it to the Circuit Court of Appeals to apply those principles. Of course, there will continue to be slightly different contracts of employment involved in these cases, and the Belo decision contemplates that some variation is legal, and it does not seem to us that it is worth while for this Court to spend its time on an employment agreement made by a small company that is out of business.

The only reason the District Court arrived at such large figures in its judgment was that the District Court did not follow the Carleton Screw Products rule, but figured all overtime at 60 cents. A very substantial portion of the money awarded was due to applying the 60-cent rate to weeks of over 61 hours, and to weeks between 40 and 60 hours where no such rate can be justified, under both the Missel case and the Belo case. The Carleton Screw Products rule would not give anything like the increased amount found by the District Court. Also $1,493.80 of the amount awarded by the District Court is due to the findings in favor of Reddick and Passwater, which were approved by the Circuit Court of Appeals and are not challenged in this Court.

So far as we can see, this case possesses no general interest such as this Court customarily requires in cases where a writ of certiorari is to issue.

CONCLUSION

The respondent, therefore, contends that no writ should be issued in this case, first, for the reason that the case is correctly decided; second, for the reason that any principles of law that are involved have already been sufficiently announced in the Belo case; third, for the reason that the present contentions of the petitioner, if accepted, involve a rather insignificant amount of money that would not justify the Court in devoting its time to the controversy, and fourth, the case is also one possessing no appreciable general interest to the public, and involving no conflict in Circuit Court of Appeals decisions. The petition, therefore, should be denied.

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